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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 623

AMERICAN CAR AND FOUNDRY COMPANY,
A CORPORATION,
Petitioner,

vs.

H. A. BRASSERT,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

WILLIAM HOWARD,
ROY O. WEST,
PERCY B. ECKHART,
LEWIS C. JESSEPH,
Proctors for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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STATEMENT.

The opinion rendered in this case by the United States Circuit Court of Appeals for the Seventh Circuit is reported in 61 Fed. (2d) 162. We do not question the jurisdiction of this Court.

We believe, however, there are certain facts which should have further attention. They are:

1. The Conditional Sales Agreement provides that "Purchaser shall have and be entitled to the possession and use of the boat from its delivery hereunder, but only upon and subject to all the conditions hereof" (R. 6).

2. Paragraph 8 of the Agreement provides that the right to the possession and use of the boat may be forfeited if the purchaser shall default in the payment of the notes given to evidence the remainder of the purchase price; if a receiver is appointed to take possession of the purchaser's property or a petition in bankruptcy is filed by or against him or he makes a general assignment for the benefit of creditors; if the purchaser shall default in the performance of any of the provisions of the contract, and, *if the seller shall deem the security for the* payment of said notes *intended* to be afforded hereby insufficient or unsafe (R. 7, 8).

It is alleged in the libel and admitted by filing the exceptions thereto that on August 18, 1930, the date upon which the boat was destroyed by explosion and fire, the Conditional Sales Contract was in "full force and effect" (R. 9).

3. It is further provided by the agreement that "4. Purchaser shall at all times and at Purchaser's own expense, keep the boat insured with full marine coverage *including protection and indemnity* (with loss, if any, payable to the Seller as its interest may appear) in a company or companies approved by Seller. The insurance coverage against loss or damage by fire shall be in an amount not less than the full amount of the *notes issued hereunder outstanding and unpaid.* The insurance policies, or duplicates of them, shall be delivered to and remain with the Seller" (R. 6).

"5. * * * Purchaser shall comply with all the laws of the United States affecting the boat and of all the States and territories in which the boat may be operated, and with all lawful acts, rules, regulations and directions of any authority exercising any power, regulation or supervision over the boat. *Purchaser shall in-*

demnify, protect and hold harmless Seller from and against any and all liability, claim, demand, cost, charge and expense in any way imposed upon or accruing to Seller arising out of or in connection with the use and/or operation of the boat" (R. 6).

4. It is admitted that petitioner, at the time of the transaction in question, was "engaged in the manufacture and sale of gasoline-propelled yachts and cruisers; and that on August 18, 1930, the boat it sold to Respondent was destroyed by explosion and fire while being operated by him on Lake Michigan, navigable water of the United States" (R. 2, 10).

The Exceptions contain among others the following specifications:

> "The Respondent, H. A. Brassert, hereby excepts to the libel herein in the following respects:
>
> "1. That it does not disclose that the Libelant was the owner of the motor boat 'Orion' at the time of its destruction by explosion and fire, as therein alleged.
>
> "2. That it does not disclose that the Libelant was the owner of said motor boat 'Orion' in such manner and to such extent as to warrant the maintenance of a proceeding to limit the liability of shipowners.
>
> "3. That it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any time prior thereto, said motor boat 'Orion' was engaged or was being used by Libelant in maritime commerce upon the high seas and/or upon the navigable waters of the United States.
>
> "4. That it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any time prior thereto, the said motor boat 'Orion' was engaged or was being used by Libelant in the transportation of passengers and/or freight for hire upon the high seas and/or upon the navigable waters of the United States.

"5. That it does not disclose that at the time of the destruction of the motor boat 'Orion' by explosion and fire, as therein alleged, Libelant was a 'ship-owner' within the meaning of that term as used in Sections 183 to 189, inclusive, U. S. C. A., Chapter 8, Title 46, or any other acts or statutes of the United States limiting the liability of 'ship-owners.'

"6. That it does not disclose that at the time of the destruction of said motor boat 'Orion' by explosion and fire, as therein alleged, or at any other time, Libelant was engaged in the business of building and operating ships or boats of any kind in maritime commerce upon the high seas and/or upon the navigable waters of the United States.

"7. That it does not disclose that at the time of the destruction of said motor boat 'Orion' by explosion and fire, as therein alleged, or at any other time, Libelant was engaged in the business of shipping upon the high seas and/or upon the navigable waters of the United States.

"12. That it does not disclose that the contract set forth in Paragraph 4 thereof is not personal, creating a personal liability on Libelant and therefore is not within the statutes of the United States limiting the liability of ship-owners.

"13. That it does not disclose facts sufficient to justify limiting the liability of Libelant * * *" (R. 16-17).

The case involves three questions, all of which were decided for respondent by the Circuit Court of Appeals. They are:

1. Petitioner was not the "owner" of the boat within the meaning of the United States Statute limiting the liability of "ship-owners."

2. The statute limiting the liability of "ship-owners" does not apply to one engaged solely in the manufacture of gasoline-propelled yachts and cruisers or other vessels.

3. Since the motor boat was not manned and operated by a master and crew of petitioner, there is no liability that can be limited.

We shall contend that these questions were correctly decided; that they were decided in conformity with the decisions of this Court, and that the petition for writ of certiorari should be denied.

III.

AT THE TIME OF ITS DESTRUCTION, THE MOTOR BOAT WAS NOT MANNED AND OPERATED BY A MASTER AND CREW OF PETITIONER. THERE IS NO LIABILITY, THEREFORE, THAT CAN BE LIMITED. THE LIBEL DOES NOT STATE A CAUSE OF ACTION.

The only liability which can be limited under the statute is the imputed liability of the ship-owner. The liability of the owner for his own fault, neglect and contracts is not affected by the statute. But the motor boat was not in charge of petitioner's agents and servants when it was destroyed. There is, therefore, no imputed liability to limit.

ARGUMENT.

I.

AT THE TIME THE MOTOR BOAT WAS DESTROYED, PETITIONER WAS NOT ITS OWNER WITHIN THE MEANING OF THE WORD "OWNER" AS USED IN SECTION 183, TITLE 46, U. S. C. A., AND OTHER UNITED STATES STATUTES LIMITING THE LIABILITY OF SHIP-OWNERS.

"A" We are here concerned with the meaning of the word "owner" as used in Section 183, Title 46, U. S. C. A., which provides:

> "The liability of the *owner* of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such *owner or owners*, shall in no case exceed the amount or value of the interest of such *owner* in such vessel, and her freight then pending."

In 22 R. C. L. 75, it is said:

> "The meaning of the term 'owner' is varied and depends in a great measure on the manner of its use. When used alone it imports an absolute owner or one who has *complete dominion* of the property owned, as the owner in fee of real property. The term is undoubtedly broad enough to cover a tenant for years, a tenant for life, and a remainderman in fee. So there may be a legal and an equitable estate; the trustee and the *cestui que trust* are both owners. The term when used without restriction includes both general and special owner. *Both in common parlance and in legal acceptation, he is the owner of property who, in case of its destruction, must sustain the loss of it.* Therefore a person is

> the 'owner' of property although he holds the equitable title only. *Thus one who is in possession of land, under a contract for the conveyance of the fee on the payment of the purchase money, is the equitable owner in fee, and he is the entire unconditional and sole owner within the meaning of insurance policies requiring such an ownership.*"

In 50 C. J. 771, we find that "the term 'owner' has a variety of meanings, and is a versatile term, to suit the circumstances in which it is used; it varies in its significance according to the context and subject matter, that is, the meaning of the term is to be gathered from the connection in which it is used, and from the subject matter to which it is applied."

"B" It may include an equitable as well as a legal ownership. In *Schott* v. *Harvey,* 105 Pa. St. 222, 51 Am. Rep. 201, the Supreme Court of Pennsylvania had occasion to define the word "owner" used in a statute of that State requiring the "owners, superintendents or managers" of factories to provide fire escapes. The precise question was, whether the landlord or the tenant was the "owner." In deciding the question, the Court said at pp. 228-229 of the official report, p. 204, 51 Am. Rep.:

> "A number of authorities were cited showing the construction which has been placed upon the word 'owner' both by the legislature and the courts. But the meaning of the word depends in a great measure upon the subject matter to which it is applied, and as it is used in each of the instances cited in an entirely different connection, they throw scarcely a glimmering of light upon the question. The term 'owner' is undoubtedly broad enough to cover either view of the case. A tenant for years, a tenant for life, and a remainderman in fee is each an owner. So there may be a legal and an equitable estate; the trustee and the *cestui que trust* are both owners. When therefore the legislature used a term of such varied meaning, we must presume they intended such

an owner as is *in the possession and occupancy of the premises, who has the immediate dominion and control over it, and the manner of whose use of it makes a fire-escape necessary.* Had the owner in fee been intended it was easy to have said so. This view meets all the requirements of the Act. It places the responsibility where it properly belongs, upon the person in the possession and occupancy of the property as owner for the time being, and the nature of whose business renders the erection of fire-escapes necessary to protect the lives of his employees."

In *Green* v. *Root,* 62 Fed. 191, the United States District Court for the Southern District of Iowa, Eastern Division in construing the word "owner" as used in the homestead statutes of that State, said at page 196 that "the term 'owner,' as applied to homestead, in said section, by the Iowa supreme court, includes one who, as tenant in common, *has merely an equitable title in the land,* one who has merely a term of years leasehold interest in the land, and also one who has merely the *right to obtain the title by paying off the deferred purchase money.*"

"C" In *Warren* v. *Salt Creek Drainage District,* 316 Ill. 345, the Supreme Court of Illinois, in defining the term "landowner" as used in the Levee Act, said at p. 347:

> "The word 'owner' is *nomen generalissimum,* and its meaning is to be gathered from the connection in which it is used and from the subject matter to which it is applied, *and when used in a statute the obvious nature and purpose of the statute may indicate its meaning.*"

"D" The term "owner" implies more than *a bare legal title.*

In *Hyde* v. *Shine,* 199 U. S. 62, this Court was considering the meaning of the word "owner" as found in the

Act of June 4, 1897, providing that where a tract of land is included within a public forest reservation, the *settler* or *owner* thereof may relinquish the tract to the Government. In discussing that question, the Court said at p. 82:

> "Although the word owner has a variety of meanings and may, under certain circumstances, include an equitable as well as a legal ownership, or even a right of present use and possession, *it implies something more than a bare legal title*, and we know of no authority for saying that a person in possession of land under a void deed can be regarded as the owner thereof. Ownership may not imply a perfect title, but it implies something more than the possession of land under a title which is void; and when the Government holds out to owners of land an inducement to relinquish such lands in exchange for others, it implies that the persons with whom it is dealing, if not the owners in fee simple, are at least bona fide owners, with authority to dispose of and vest a good title thereto."

This language is significant when viewed in the light of the facts of this case. Here, petitioner agreed to sell and respondent agreed to buy the motor boat. Seven Thousand Dollars ($7,000), or one-half the purchase price was paid at the time the boat was delivered to respondent. The Conditional Sales Agreement specifically declared "Purchaser shall be entitled to the possession and use of the boat so long as Purchaser shall observe the conditions and obligations hereof * * *" (R. 6).

By these provisions of the agreement, the beneficial ownership of the motor boat was vested in respondent. The *"bare legal title"*, however, was reserved in the petitioner for the purpose of security only. This clearly appears from that clause in the agreement providing "if the Seller shall deem the security for the payment of the said note intended to be afforded hereby insufficient and unsafe, then, in such case, or either of such cases,

the Seller shall be entitled to and may at its option retake the boat, the equipment thereof and the accessories thereto, retaining all payments which up to said time shall have been made on account thereof (which amount it is hereby expressly agreed, constitutes no more than the reasonable value of the use of the boat)" (R. 8).

The "bare legal title" alone was retained as "security for the payment of the notes" (in this case one note only) given to evidence the balance of the purchase price of the boat.

"E" Coming nearer to the meaning of the term "owner" as used in Section 183, Title 46, U. S. C. A., we find that a mortgagee of a vessel out of possession is not liable for repairs as an owner. In 24 R. C. L. 1086 it is said:

> *"As with other chattel mortgages, it is very generally held that the mortgage of a ship vests in the mortgagee a present legal title defeasible on condition. * * * In the absence of an express agreement to the contrary, a mortgagee not in possession of the vessel is not entitled to the earnings as an incident of his mortgage, nor liable for repairs and necessaries ordered by the mortgagor, or for the discharge of any other duties and obligations incident to vessel ownership, even though the vessel be registered in his name. These rights and liabilities rest on the mortgagor until the mortgagee takes possession and thereby succeeds to them."*

Morgan's Assignees v. *Shinn*, 15 Wall. 105, was an appeal from the Supreme Court of the District of Columbia. The assignees of Morgan, Rhinehart & Co. filed a bill in the lower court against Shinn to enforce contribution for the payment of advances made by their assignors for repairs and expenses of a steamer called the Fairfax. The bill averred that Shinn was owner of a one-fourth interest in the vessel. Shinn by his answer denied the averment of ownership and alleged an inter-

est only as mortgagee. After finding that a bill of sale by one of the co-owners to Shinn was intended as security only, and although "absolute in its terms," was a mortgage, the Court said at p. 110:

> *"If then Shinn was only a mortgagee of an undivided interest in the vessel,* as we think he was, he is under no obligation to contribute for repairs which he did not order. A mortgagee out of possession is not liable for repairs. The benefit of repairs enures primarily to the mortgagor. *A mortgagee out of possession does not appoint the master or the ship's agents. They do not act under authority from him, and he is not entitled to the freight earned. Nor does it make any difference though the vessel be registered in his name."*

We find no authority to the contrary. If a mortgagee out of possession is not liable for repairs as an owner, we submit he would not be liable for the loss of freight or passengers as an owners under the statute in question.

"F." Vendors of a vessel under a conditional sales agreement are not liable as owners for loss of freight, or for repairs or supplies furnished to the vessel.

In 24 R. C. L. 1195, it is said:

> "As in the case of other obligations incident to vessel ownership, liability for supplies, repairs and advances attaches to the owner *pro hac vice*, whether he is the general owner or not. A person may, however, be the legal owner of a vessel, and have her registered or enrolled in his name, without being liable for supplies furnished for her use on the order of the master, as where he holds merely the legal title, without management or control, whether the title is by a bill of sale or other sufficient conveyance, or whether it is by mortgage or other document in the nature of a pledge or security. *No liability for such supplies rests upon a person holding legal title to a vessel as security for a debt, and exercising no control over the vessel and having no interest in the*

profits other than as a repayment of advances, as, for example, a vendor who has parted with both possession and control of the vessel, and only retains the title for the purpose of securing future payments of the purchase money, or who has taken a mortgage upon her, without holding himself out to the world as continuing in ownership.''

Jones v. *Pitcher,* 3 Stewart & Porter (Ala.) 135, 168; 24 Am. Dec. 716, 734, was an action in assumpsit by Pitcher & Co. against Jones and others as joint owners of the steamboat Warrior, to recover the value of sixty-nine bales of cotton shipped by Pitcher & Co. on board the Warrior from Tuskaloosa to the port of Mobile. It was alleged that the loss was caused by the negligence of the master of the boat. At the trial defendants, Sims & Scott, offered in evidence a contract between themselves and Hammond & Donaldson, for the sale of the interest of the former in the boat. The agreement was in the nature of a penal bond, whereby Sims & Scott bound themselves for a sale of all their interest in the Warrior. In consideration for this interest, Hammond & Donaldson agreed to pay the sum of Three Thousand Five Hundred Dollars, to be discharged in freight and to insure the steamboat for the sum of Five Thousand Dollars and to deliver the policy to Sims & Scott as further security.

The court instructed the jury that this contract was a transfer of the right of Sims & Scott to Hammond & Donaldson, and discharged the former from all liability for losses subsequently occasioned by the boat ''unless the contract was fraudulent, or unless Sims & Scott had subsequently received a portion of the earnings of the boat, or had participated in the appointment of a master, or had done other acts evincive of ownership.'' (See 3 Stewart & Porter, 138, 139.) After reviewing the authorities, it was held that ''An agreement, bona fide, for the sale of an interest in a steamboat, between

part owners thereof, and a stranger, whereby the former were to execute title, when the purchase money should be paid; to hold the policy of insurance as collateral insurance; and to receive the consideration money, in freight; held not to continue the liability of the vendors, so as to render them responsible for the liabilities fixed upon the boat, after the execution of the contract; it appearing that the interest in the boat had passed into the possession and use of the vendees."

Thorn v. *Hicks*, 7 Cowen (N. Y.) 696, was an action in case against the owners of a sloop for certain bales of pressed hay shipped on board the sloop from Hudson to New York, but which were destroyed by fire. The question at the trial was whether the defendant was the owner of the sloop. The facts were, that on the 10th of January, 1821, Jacob Acker being owner of the sloop, she was then sold on a fi. fa. against him, in favor of the defendant, with one Waring and others. Waring purchased for the plaintiffs in the execution; and he testified that afterwards, and before the hay was put on board, he, on his own behalf, and as trustee of the other owners, sold the sloop to Acker, the former owner, on these terms: Acker to take possession and employ the sloop in the freighting business; to pay the several persons interested in the sale their respective portions of the price as fast as he could earn the money with the sloop, and that when they were thus paid the legal title was to be transferred to Acker. In the meantime, the legal title was to remain in the vendors. Acker immediately took possession and carried on the freighting business until the destruction of the hay. This the plaintiff knew when the hay was shipped and that Acker carried on the business upon his own account and they spoke of setting off a note against Acker, purchased by them below par, in payment for the freight. The judge

charged that the defendant was liable, as long as he held the title to the sloop or any part of her, or had an interest in her earnings, so far as they should go to enable Acker to pay for her. The jury returned a verdict for the plaintiffs. In disposing of the case, the Court said at p. 697:

> *"The mere circumstance of the naked legal title to the vessel remaining in Hicks and his associates, to secure the purchase money for which she had been sold, unquestionably would not render them liable as owners, on the contracts of the master, or for the consequences of his negligence and unskilfulness."*

And further, at p. 698, it is said:

> "These cases (*Wendover* v. *Hogeboom*, 7 John. 308, and *Leonard* v. *Huntington*, 15 John. 298) settle two points: 1. That the ownership of a vessel is not determined by the register; (vid. also 14 John. 201;) 2. That a regular bill of sale is not essential to transfer the property in a vessel, so as to exempt the former owners from responsibility for articles furnished to her; but that where the contract for the sale is made, and the vessel delivered to the purchaser, the responsibility of the vendor ceases as owner, although, by the express terms of the contract, he retain the legal title in himself, for the purpose of securing the consideration money, until it is paid."

It was held that the charge of the trial judge was erroneous and a new trial was granted.

These cases were decided before the Limited Liability Statutes were passed by Congress. They do not construe Section 183, Title 46, U. S. C. A. They do indicate very clearly, however, who was the "owner" of the vessel and the persons for whose benefit these statutes were passed by the Congress. In other words, those persons are "owners" upon whom liabilities rest which can be limited under the statutes in question. In the absence of liability which can be limited under these statutes, no

person is an "owner." Unless it can be found in this case that a liability which can be limited rests upon petitioner, it must be held that it was not the owner of the motor boat at the time of its destruction.

"G." We have found no authority which decides who is the "owner" of a vessel within the meaning of Section 183, Title 46, U. S. C. A., under the facts of this case. In the following cases, however, it is held that persons were "owners" within Section 183, under the facts therein.

Craig v. *Continental Insurance Co.*, 141 U. S. 638, was an action at law by Craig, as administrator of the estate of John Carbry, deceased, against the Continental Insurance Company of New York and three other insurance corporations, to recover under the Michigan statute $25,000 as damages for the death of Carbry, for the benefit of his mother and his three minor sisters, as next of kin and distributees of his estate, it being alleged that he lost his life through the negligence of the defendants in December, 1883. The action was commenced in the Superior Court of the City of Detroit, Michigan, and was removed by the defendants to the Circuit Court of the United States for the Eastern District of Michigan. The facts were, that the defendants were insurers against marine risks of a steam propeller called the Enterprise. While on a voyage on the Lakes, she was stranded November 20, 1883, on rocks at Green Island in the northern part of Lake Huron. She had on board at the time a cargo of merchandise and a crew of 10 or 12 men. After stranding, her owners abandoned her to the insurers and she became the property of the latter. Crosby & Dimock of Buffalo were general agents for the Continental Insurance Company and some other companies and had in their employ James J. Reardon, a marine in-

spector. It was his duty, when notified, to go to the assistance of wrecks and stranded vessels insured by companies represented by Crosby & Dimock and get them to a port of safety. On November 29, 1883, Reardon was notified by Crosby & Dimock in regard to the Enterprise, and went with a steam-tug called the Balize, with steam-pumps and engineers, to her assistance. One of the steam-pumps was in charge of Carbry. Soon after reaching the Enterprise, her crew being still on board and in charge of her, the steam-pumps were set up, she was pumped out and pulled from the place where she had stranded. This was done under the supervision of Reardon. She was more or less injured by the stranding; but when she was off she was towed into deep water, and, although she leaked, she was kept free by the use of one pump for about 66 hours. That was from 10 o'clock Thursday morning until 4 o'clock the following Sunday morning. Part of her cargo had been removed, but it was replaced. Her machinery was disabled, and it was necessary that the Balize should take her in tow to remove her to a port where she could be repaired. She started in tow astern of the Balize, bound for Detroit, at 4 o'clock on Sunday morning, December 9, 1883, with her cargo on board and a crew of 13 men, including 4 who were in charge of two steam-pumps, one of which was under the care of Carbry. Her mate was in command. Reardon was on board the Balize. No trouble was experienced in the navigation of the Enterprise until 2 o'clock on the morning of the next day, 22 hours after she had started, and then, while off Point aux Barques and Saginaw Bay, she filled and sank, became a total loss, and Carbry lost his life. The declaration alleged that his life was lost through the negligence of the defendants.

At the trial three of the defendant companies, other

than the Continental Insurance Company, were dismissed from the action and a verdict was rendered by a jury against that Company for the sum of $8,000. On motion, a new trial was granted the Continental Insurance Company on the ground that the liability, if any, was defeated under the provisions of Section 4283 of the Revised Statutes of the United States (Section 183, Chapter 46, U. S. C. A.) Upon a re-trial, the Court instructed the jury to render a verdict in favor of the defendant, which was done. The plaintiff excepted to the instruction of the Court in this respect. The case was then taken to this court by writ of error. It was stated in the bill of exceptions that prior to the sending of the expedition under Reardon to rescue the Enterprise, she had been abandoned by her owners to the Continental Insurance Company by which she was insured, and had become its property and that, by reason of her being sunk at the time Carbry lost his life, she became and was a total loss. In disposing of the case this court held that "The provisions of Section 4283 of the Revised Statutes relieving the owner of a vessel from liability for a loss occasioned without his privity or knowledge, apply to an insurance company, to which, as insurer, a vessel has been abandoned, and which was charged with negligence in causing the vessel to be so towed that she sank and became a total loss, and the life of an employee on board her was lost."

In this case the death of Carbry occurred while the vessel was in possession of the insurance company which had become her "owner." The property in the vessel had passed to the insurance company by abandonment by her former owners. If any liability attached under these facts, it was the liability of the insurance company, the "owner," and such liability could be limited under the

statutes in question. Here we have a liability which could be limited, if found to exist.

Flink v. *Paladini*, 279 U. S. 59, was a certiorari to a decree of the Circuit Court of Appeals for the Ninth Circuit, reversing an order of the district court in a proceeding to limit liability for personal injuries suffered by petitioner while serving aboard ship at sea. The reversed order refused a stay of actions in State and Federal courts, which the petitioner had brought against the respondents to enforce their liability under the State law (California) as stockholders of the corporation owning the ship. Petitioner sued the corporation and its stockholders, the respondents, under the Constitution and Civil Code of California which provided that "each stockholder shall be individually and personally liable for such proportion of all its debts and liabilities contracted during the time he was a stockholder, as the amount of stock owned by him bears to the whole of the subscribed capital stock" (279 U. S. 62). It was contended the stockholders were not "owners" within the meaning of that word as used in Section 183, Title 46, U. S. C. A., but this court held otherwise. At page 62 of the opinion it is said:

> "The purpose of the act of Congress was 'to encourage investment by exempting the investor from loss in excess of the fund he is willing to invest in the enterprise.' 26 F. (2d) 24. *Richardson* v. *Harmon*, 222 U. S. 96, 103. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 214. For this purpose no rational distinction can be taken between several persons owning shares in a vessel directly and making the same division by putting the title in a corporation and distributing the corporate stock. The policy of the statutes must extend equally to both. In common speech the stockholders would be called owners, recognizing that their pecuniary interest did not differ substantially

> from those who held shares in the ship. We are of opinion that the words of the acts must be taken in a broad and popular sense in order not to defeat the manifest intent."

In the Paladini case, the stockholders were made liable for the debts of the corporation by the law of California, and they were simply attempting to limit their own liability. But the interesting phase of the holding is, that being liable as stockholders they were allowed to limit their liability as owners. This brings us back to our previous statement that an "owner" within the meaning of the statute is one upon whom rests a liability which can be limited by resort to the statutes enacted for that purpose.

In the *Paladini case* (279 U. S. 59), the stockholders, acting through their corporation, purchased a vessel. In the instant case appellant had sold the vessel, the motor boat. In fact, appellant had parted with its investment in the motor boat by transferring it to another. It had parted with the possession, use and enjoyment of the property. Dominion over the property was in another, and to make doubly sure that its liability should cease, it provided in the Conditional Sales Agreement that "Purchaser shall indemnify, protect and hold harmless seller from and against any and all liability, claim, demand, cost, charge, and expense in any way imposed upon or accruing to seller arising out of or in connection with the use and/or operation of the boat" (R. 6).

Furthermore, in the Conditional Sales Agreement it is provided "Purchaser shall at all times, and at purchaser's own expense, keep the boat insured with full *marine coverage*, including protection and indemnity, (*with loss, if any, payable to seller as its interest may appear*) in a company or companies approved by seller. *The insurance coverage against loss or damage by fire*

shall be in an amount not less than the full amount of the notes issued hereunder outstanding and unpaid. The insurance policies, or duplicates of them, shall be delivered to and remain with seller" (R. 6).

It is alleged in Paragraph 5 of the libel, page 9 of the record "that on the 18th day of August, 1930, said agreement was in full force and effect and that there was due and owing said American Car and Foundry Company, as owner, from said H. A. Brassert, the sum of Seven Thousand Thirty-nine Dollars and Three Cents ($7,039.03), as set forth in said agreement and as evidenced by a promissory note for said amount, dated June 20, 1930, signed by said H. A. Brassert, as maker, and payable to said A. C. F. Co. 90 days after date."

August 18, 1930, was the day the boat was destroyed by explosion and fire. On that day respondent owed petitioner the balance of the purchase price, and he was therefore the owner of the boat. If the Conditional Sales Agreement was in full force and effect on that date, then the boat was insured as provided by the terms of the contract, and the insurance was payable to petitioner as its interest might appear. Its interest was one of Seven Thousand Thirty-nine Dollars and Three Cents ($7,039.03). It had parted with the boat and was interested only in securing the purchase price. In truth, its position was the same as it would have been had it sold the boat and taken back a chattel mortgage to secure the balance of the purchase price. The purchase price of the motor boat was the property of petitioner. The motor boat was the property of respondent. He was the "owner" therefore within the meaning of that word as used in Section 183, Title 46, U. S. C. A. and kindred statutes limiting the liability of a shipowner.

While the words of the Act should be "taken in a

broad and popular sense," they should not be taken in so broad and popular a sense as to include those who were in no wise within the contemplation of the law, and who, we shall hereinafter contend, have no liability which can be limited under the statutes in question.

II.

THE UNITED STATES STATUTES LIMITING THE LIABILITY OF "OWNERS" DO NOT APPLY TO ONE ENGAGED SOLELY IN THE MANUFACTURE OF GASOLINE-PROPELLED YACHTS AND CRUISERS OR OTHER VESSELS.

A. It is alleged in Paragraph 1 of the libel (R. 2) that American Car & Foundry Company "during several years last past was, and now is, engaged in the manufacture and sale of gasoline-propelled yachts and cruisers * * *." This is the only allegation in the record with reference to the petitioner's business. It is nowhere alleged that petitioner was at any time engaged in the business of navigating ships or vessels upon the high seas or the navigable waters of the United States, or in any other business maritime in nature.

The libel was excepted to as being insufficient upon the grounds, among others, "that it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any time prior thereto, said motor boat 'Orion' was engaged or was being used by libelant in maritime commerce upon the high seas and/or upon the navigable waters of the United States. That it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any time prior thereto, the said motor boat 'Orion' was engaged or was being used by libelant in the transportation of passengers and/or freight for hire upon the high seas and/or

upon the navigable waters of the United States. That it does not disclose that at the time of the destruction of the said motor boat 'Orion' by explosion and fire, as therein alleged, or at any other time, libelant was engaged in the business of building and operating ships or boats of any kind in maritime commerce upon the high seas and/or upon the navigable waters of the United States. That it does not disclose that at the time of the destruction of the said motor boat 'Orion' by explosion and fire, as therein alleged, or at any other time libelant was engaged in the business of shipping upon the high seas and/or upon the navigable waters of the United States. That it does not disclose facts sufficient to justify limiting the liability of libelant. That it does not disclose that a court of admiralty has jurisdiction of the subject matter of this proceeding'' (R. 16, 17).

This question therefore arises, can a manufacturer of "gasoline-propelled yachts and cruisers'' limit liability under the statutes passed for that purpose? We contend that it cannot. It has been held repeatedly that the purpose of the statutes limiting the liability of ship-owners was to promote shipping or maritime commerce. In 24 R. C. L. 1389-1390, it is said:

> "*The statutes limiting vessel owners' liabilities were passed by Congress for the purpose of encouraging the investment of capital in the building and navigation of ships, by enabling the owners of American ships to compete upon equal terms of liability with foreign shipowners.* Being declaratory of the rule deemed by the lawmaking power to be most just and expedient in maritime cases, these statutes should be administered by the courts in a spirit of fairness, with a view of giving to shipowners the full benefit of the immunities intended to be secured by them, and carrying out the policy they were intended to promote. The several enactments are to be regarded as regulations in pari materia, and should be construed as parts of an entire scheme.

It is none the less true, however, that these acts are in derogation of the common law; and the courts should not construe them to abridge the rights of injured parties to a greater extent than the language used will fairly warrant, or to limit the right to a recovery beyond what is necessary to effectuate the purpose of Congress.''

In The ''Scotland'', 105 U. S. 24, it is said at pp. 30-31:

''This statute (Section 183) declares the rule which the law-making power of this country regards as most just to be applied in *maritime cases.* The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employes, but risk only the amount of their capital stock in the corporation. The doctrine of respondeat superior, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of ship-owners, 'Men would be deterred from *owning and operating ships,* if they were subject to the fear of an indefinite liability for the *acts of the master.*' ''

In *Providence Etc. S. S. Co.* v. *Hill Mfgr. Co.*, 109 U. S. 578, speaking of the statutes limiting the liability of ship-owners, the Court said at p. 588:

''In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the *shipping interest,* the value and importance of which to our *maritime commerce* can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of *fairness,* with the view of giving to *ship owners* the full benefit of the immunities intended to be secured by it, the encouragement it will afford to *commercial*

operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the *ship owner,* and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

In *The Main* v. *Williams,* 152 U. S. 122, it is said at p. 128:

"The earliest American legislation upon this subject (limited liability of shipowners) is found in a statute of Massachusetts passed in 1818, and revised in 1836. This was taken substantially from the statute of George II. It was followed by an act of the legislature of Maine in 1831, copied from the statute of Massachusetts.

The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of The Lexington, reported under the name of the *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 344, was decided by this court. In this case the owners of a steamboat, which was burnt on Long Island Sound were held liable for about $18,000 in coin, which had been shipped upon the steamer and lost. *In consequence of the uneasiness produced among ship owners by this decision, and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in* 1851, *enacted what is commonly known as the Limited Liability Act, which has been incorporated into the Revised Statutes, sections* 4282 *to* 4290, *and amended in certain particulars not material to this case, in two subsequent acts.*"

And further, at p. 132, it is said:

"The English courts have held, very properly we think, that these statutes should be strictly construed. As observed by Abbott, C. J., in *Gale* v. *Laurie,* 5 B. & C. 156, 164: 'Their effect, however, is to take away or abridge the right of recovering dam-

ages, enjoyed by the subjects of this country at the common law, and there is nothing to require a construction more favorable to the ship owner than the plain meaning of the word imports.' To the same effect are the remarks of Sir Robert Phillimore in The Andalusian, 3 P. D. 182, 190, and in The Northumbria, L. R. 3 Ad. & Ec. 6, 13. Speaking of this statute, Lord Justice Brett, in *Chapman* v. *Royal Netherlands Nav. Co.*, 4 P. D. 157, 184, remarked: 'A statute for the purposes of public policy, derogating to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner * * *. It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties.'

While, from the universal habit of insuring vessels, the application of the statute probably results but rarely in an actual injustice to the owner of the injured vessel, yet, being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of Congress."

In *Evansville Etc. Co.* v. *Chero Cola Bottling Co.*, 271 U. S. 19, the Court, in holding that a wharfboat in a river, used as an office, warehouse, and wharf, but not used or capable of use as a means of *transportation*, was not a "vessel" within the Limited Liability Act, said at pp. 21-22:

"The rule of limited liability of owners of vessels is an ancient one. It has been administered in the courts of admiralty in Europe from time immemorial and by statute applied in England for nearly two centuries. See *Providence & New York S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 593; *The Main* v. *Williams*, 152 U. S. 122, 127. Our statutes establishing the rule were enacted *to promote the building of ships, to encourage the business of navigation*, and in that respect to put this country on the same footing with other countries. See *Moore* v.

American Transportation Co., 24 How. 1, 39; *Norwich Company* v. *Wright*, 13 Wall. 104, 121. *The rule should be applied having regard to the purposes it is intended to subserve and the reasons on which it rests.*

The only question presented is whether appellant's wharfboat was a 'vessel' at the time it sank. It was an aid to river traffic, but it was not used to *carry freight from one place to another. It was not practically capable of being used as a means of transportation.* It served at Evansville as an office, warehouse and wharf, and was not taken from place to place. The connections with the water, electric light and telephone systems of the city evidence a permanent location. *It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed. There appears to be no reason for the application of the rule of limited liability.*"

These cases all deal with the statutes under consideration. The statutes were passed to promote the building and navigation of ships in maritime commerce. The risk or hazard incident to transportation by water was that with reference to which liability could be limited under the statutes. They deal with the "*perils of navigation.*"

It is needless to say there is no "*peril of navigation*" in the business of manufacturing ships only. The peril attaches when the owner engages in navigation, or in the transportation of goods and passengers in maritime commerce.

"B." Furthermore, a contract to build a vessel is not a maritime contract. In 1 R. C. L. 420, it is said:

> "*That contracts for the building of vessels or ships, or for labor performed or materials furnished in their construction, are not maritime contracts, and not cognizable in admiralty, is affirmed by the whole current of judicial authority.*"

All of the judicial decisions sustain this statement of the law, and in *Edwards* v. *Elliott*, 21 Wall. 532, the Court said at p. 554:

> "*Shipbuilding is an occupation requiring experience and skill, and, as ordinarily conducted, is an employment on land, as much as any other mechanical employment, and men engage in the business for a livelihood just as they do in other mechanical pursuits and for the same purpose.* Shipwrights, unlike the seamen, have their homes on the land, and not on the seas, and they are seldom ship owners, and not more frequently interested in commerce and navigation than other mechanics. *Ships are bought and sold in the market just as ship timber, engines, anchors, or chronometers are bought and sold, even before they are fully constructed and before they are equipped for navigation*, and no reason is perceived why a contract to build a ship, any more than a contract for the materials of which a ship is composed, or for the instruments or appurtenances to manage or control a ship, should be regarded *as maritime*."

Under these authorities and the allegations of the libel, we do not believe a cause of action is stated. The manufacture of "gasoline-propelled yachts and motor boats" is a business conducted on land and is no more subject to the risks and perils of the sea than is the business of manufacturing "ship timbers, engines, anchors or chronometers," all of which are used in the construction of ships and vessels. Unless the courts are prepared to extend the Limited Liability Statutes to all those engaged in the manufacture of the equipment above mentioned, we believe the libel cannot be sustained.

III.

AT THE TIME OF ITS DESTRUCTION, THE MOTOR BOAT WAS NOT MANNED AND OPERATED BY A MASTER AND CREW OF PETITIONER. THERE IS NO LIABILITY, THEREFORE, THAT CAN BE LIMITED. THE LIBEL DOES NOT STATE A CAUSE OF ACTION.

In Paragraph 6 of the libel, page 10 of the record, it is said: "That on the 18th day of August, 1930, libelant is *informed that said A. C. F. cruiser was being operated by said H. A. Brassert on the waters of Lake Michigan*, one of the navigable waters of the United States, at a point about three miles from the shore of the United States Army Reservation known as Fort Sheridan, in the State of Illinois; that at the time and place stated said H. A. Brassert was cruising on the waters of Lake Michigan from the harbor at Milwaukee, Wisconsin, to the harbor of Wilmette, Illinois, and from causes unknown to said American Car and Foundry Company an explosion is alleged to have occurred midship and near the motors of said cruiser; that your libelant is informed that said explosion was followed by fire. That said A. C. F. cruiser burned to the waters edge, filled with water, was sunk and became a total wreck and loss. Said H. A. Brassert claims that he was burned by the flames and as a result thereof received injuries alleged to be serious and permanent. Said H. A. Brassert and two other persons with him (whose names and whose injuries, if any are unknown to the libelant) in said A. C. F. cruiser at the time and place stated are alleged to have jumped into the waters of Lake Michigan with life belts and were rescued by a seaplane from Great Lakes Naval Training Station, on the coast of Lake Michigan, Great Lakes, Illinois."

Nowhere in the libel is it alleged that the motor boat was in charge of a master and crew as servants and agents of petitioner at the time of its destruction. In fact, it cannot be truthfully so alleged, since the motor boat at the time of its destruction was in the possession of respondent who was operating it as alleged in the foregoing paragraph.

The sufficiency of the libel was excepted to on the grounds, among others, "9. That it does not disclose that libelant exercised due care and diligence in selecting a competent master and crew for said motor boat 'Orion.' 10. That it does not disclose that the motor boat 'Orion' was properly officered and equipped at and before its destruction by explosion and fire as therein alleged. 13. That it does not disclose facts sufficient to justify limiting the liability of libelant. 14. That it does not disclose that a court of admiralty has jurisdiction of the subject matter of this proceeding (R. 17)."

The only liability which may be limited under the statutes is the imputed liability of the ship owner. In 24 R. C. L. 1395, the rule is stated as follows:

> "The limited liability acts were intended by Congress to reduce only the imputed liabilities of vessel owners. *It leaves the owner liable for his own fault, neglect, and contracts, and is not applicable, for instance, to a warranty of seaworthiness contained in a charter party. It cannot be invoked if the liability or loss occurs with the owner's privity or knowledge.* This qualification refers to fault or knowledge personal to him, as distinguished from the negligence or misconduct of his agents, employees or co-owners, without his knowledge or participation."

Butler v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 549, was a proceeding to limit liability in which it was contended the statute did not apply to cases of personal injuries and death. This contention was not sus-

tained. In disposing of the case, the court said at p. 549:

> "If we look at the ground of the law of limited responsibility of ship-owners, we shall have no difficulty in reaching the conclusion that it covers the case of injuries to the person as well as that of injuries to goods and merchandise. *That ground is that for the encouragement of shipbuilding and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge.*"

Richardson v. *Harmon*, 222 U. S. 96, was a proceeding to limit liability for damages to a bridge. It was contended the bridge was a land structure and the tort therefore non-maritime, and one over which admiralty had no jurisdiction. This contention was sustained by the District Court, the libel was dismissed and an action to recover at common law which had been previously instituted was allowed to proceed. The judgment of the District Court dismissing the libel to limit liability was reversed, however, on the ground that the Act of 1884 (Section 189, Title 46, U. S. C. A.) permitted limitation of liability by the ship-owner for a non-maritime tort. In the opinion of the Court, it is said at p. 106:

> *"Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts."*

Pendleton v. *Benner Line*, 246 U. S. 353, 356, was a libel by the Benner Line against Pendleton Brothers upon a charter party purporting to be made between "Pendleton Bros., agents of the schooner 'Edith Olcott'" and the libelant. It was contended the schooner was unseaworthy at the beginning of the voyage in con-

sequence of which she sank and her entire cargo was lost. One of the Pendleton brothers, who signed the firm name to the charter party, was held liable, but entitled to the statutory limitation of liability. Act of June 26, 1884, c. 121, sec. 18, 23 Stat. 57. (Section 189, Title 46, U. S. C. A.) 210 Fed. Rep. 67. The Circuit Court of Appeals, however, held the statute did not apply. (217 Fed. 497; 133 C. C. A. 349.) This Court held that the charter party was Pendleton's personal act to which the Limited Liability Statutes did not apply. The Court, speaking through Mr. Justice Holmes, said at p. 356:

> "On the proposition that the petitioner is entitled to limit his liability under the Act of 1884 it is urged that the act is an absolute limit, irrespective of privity or knowledge, in regard to contracts as well as torts, and that this contract, if it bound the petitioner at all, did so only as an indirect result of its execution. The last point hardly is intelligible. The petitioner signed the charter with the name Pendleton Brothers, which included himself, and apart from the fact that although described as agents the Pendleton brothers purport to be contracting parties, if we look only to the principals the petitioner was one of them as part owner of the vessel. The contract was between human beings and the petitioner by his own act knowingly made himself a party to an express undertaking for the seaworthiness of the ship. That the statute does not limit liability for the personal acts of the owners done with knowledge is established by *Richardson* v. *Harmon*, 222 U. S. 96. *It was said in that case, p.* 106, *that section* 18 *leaves the owner 'liable for his own fault, neglect and contracts.' The principle was held to apply to contracts less personal than this in Great Lakes Towing Co.* v. *Mill Transportation Co.*, 155 Fed. Rep. 11, *and The Loyal*, 204 Fed. Rep. 930. *We are not disposed to disturb the very strong and deliberate intimations of Richardson* v. *Harmon in their application to the present case. It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was*

wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not.''

This proposition is self-evident. If, at the time of its destruction, the motor boat was not being operated by petitioner's servants and agents, then there is no imputed liability and no liability to limit under the statutes in question. The only liability involved is that arising out of the alleged negligence of petitioner in the construction equipment and inspection of the motor boat. That is the gravamen of respondent's action against petitioner now pending on the common law side of the United States District Court, and we most earnestly contend that such liability cannot be limited.

CONCLUSION.

On the facts and the law of the case we conclude that at the time the motor boat was destroyed petitioner was not its ''owner'' within the meaning of the law limiting the liability of shipowners; that the law of limited liability does not extend to those engaged solely in the manufacture of ''gasoline-propelled yachts and cruisers'' or other vessels; and that since, at the time of its destruction, the motor boat was not in the possession or under the control of petitioner's agents and/or servants, there is no imputed liability and therefore no liability to limit. It is respectfully submitted that the petition should be denied.

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Percy B. Eckhart,
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Proctors for Respondent.